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In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN H. THOMAS AND JON-T. FARMS, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly rejected petitioners' claim of prosecutorial vindictiveness.

2. Whether petitioners' convictions should be set aside on the basis of a plea agreement that was never consummated.

3. Whether Congress intended to impose criminal penalties under 15 U.S.C. 714m(a) and (c) for filing false information with and converting the property of the Commodity Credit Corporation.

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A), the opinion on rehearing (Pet. App. B), and the opinion after remand (Pet. App. C), are reported at 593 F. 2d 615, 604 F. 2d 450, and 617 F. 2d 436.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1980. The petition for a writ of certiorari was filed on June 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners John Thomas and Jon-T. Farms, Inc., were convicted on 43 counts of making false statements for the purpose of influencing the action of the Commodity Credit Corporation, in violation of 15 U.S.C. 714m(a). In addition, petitioner Thomas was convicted on 48 counts and petitioner Jon-T. Farms was convicted on 47 counts of converting the property of the Commodity Credit Corporation, in violation of 15 U.S.C. 714m(c). Petitioner Thomas received concurrent sentences of three years' imprisonment on each count and was fined a total of $129,000 on the false statement counts. Petitioner Jon-T. Farms was fined a total of $215,000 on the false statement counts.

Subsequently, petitioner Thomas was convicted on one count of making and causing to be made a false income tax return, in violation of 26 U.S.C. 7206. He received a sentence of three years' imprisonment, to run concurrently with his prior sentences, and was fined $5,000.

On a consolidated appeal, the court of appeals reversed petitioner Thomas' conviction on one conversion count and remanded the case for a factual hearing in the district court on petitioners' claim of prosecutorial vindictiveness (Pet. App. A and B). On appeal after remand, all of the remaining convictions were affirmed (Pet. App. C).

1. The original indictment in this case charged petitioners with 71 counts of making false statements to influence the action of the Commodity Credit Corporation, in violation of 15 U.S.C. 714m(a). In addition, petitioner Thomas was charged with one count of issuing a fraudulent sight draft, in violation of 15 U.S.C. 714m(b). The district court dismissed all but three of the counts of the indictment on petitioners' motion, concluding that the charges were not sufficiently specific. The remaining counts were thereafter dismissed on the government's motion (Pet. App. 14a).

During the period in which the grand jury was considering a new indictment, petitioners negotiated with the prosecutor for a plea bargain. A tentative agreement was reached pursuant to which petitioner Thomas would enter pleas of nolo contendere to four misdemeanor counts alleging conversion and petitioner Jon-T. Farms, Inc., would enter a plea of nolo contendere to one felony count alleging false statements. The parties had not resolved the question whether the plea agreement would include a pre-plea conference with the court. While that question was being negotiated, the prosecutor informed petitioners that the grand jury was about to return an indictment charging petitioner Thomas with filing a false income tax return. Deeming the tax indictment to be inconsistent with the anticipated plea agreement, petitioners broke off negotiations (Pet. App. 11a-12a).

The grand jury subsequently reindicted both petitioners on 44 counts of making false statements, in violation of 15 U.S.C. 714m(a), and 48 counts of conversion, in violation of 15 U.S.C. 714m(c). In addition, petitioner Thomas was charged with four counts of filing a false income tax return, in violation of 26 U.S.C. 7206 (Pet. App. 14a). The government's evidence at trial showed that petitioners had entered into a scheme to obtain excessive price support payments for cotton crops through the Commodity Credit Corporation. Pursuant to a 1970 amendment to the Agricultural Adjustment Act (Pub. L. No. 91-523, 84 Stat. 1358), Congress provided that no person could receive more than $53,000 in any crop year as a price support payment for upland cotton. Regulations promulgated pursuant to the statute (35 Fed. Reg. 19340 (1970); 36 Fed. Reg. 25210 (1971)) provided that each person participating in a bona fide joint venture farming operation would be deemed a separate person for purposes of receiving payment. Petitioners were not entitled to price support payments for all of their farming operations. They accordingly leased their land to two joint ventures, for which petitioner Thomas recruited employees. The evidence showed that these joint ventures were shams operated by petitioners, rather than bona fide joint ventures (Pet. App. 6a). The price support payments claimed by petitioners were false and inflated because they were based on the number of persons participating in the sham joint ventures (Pet. App. 4a). The false statement convictions rested on the submission by petitioners of forms requesting payment for each joint venturer. The conversion counts rested on petitioners' receipt of those payments (Pet. App. 2a-6a).[1]

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[1]Petitioner Thomas' tax conviction rested on unrelated facts. That conviction was predicated on Thomas' deduction of "gambling losses" as "business expenses" on his tax return (Pet. App. 12a n.25).

2. On appeal, petitioners contended that the increased number of counts in the second indictment and the separate tax indictment reflected prosecutorial retaliation for their successful motion to dismiss the original indictment. The court of appeals concluded that petitioners had alleged a colorable claim of vindictiveness, and remanded for a factual hearing in the district court to determine the question (Pet. App. 14a-16a, 18a). On remand, the district court found that the second indictment was not motivated by prosecutorial vindictiveness and the court of appeals affirmed that factual finding (Pet. App. 19a-22a). The district court concluded, on evidence that the court of appeals found "amply sufficient," that the conversion counts were added to the second indictment so that a viable indictment would remain even if the false statement counts were dismissed a second time. The district court also found that the tax indictment was based upon facts that were not known to the government at the time the first indictment was obtained (Pet. App. 21a-22a; District Court Memorandum Opinion, Jan. 15, 1980, slip op. 4-5, 7).

ARGUMENT

1. Petitioners contend (Pet. 8-11) that the court of appeals applied an erroneous standard in evaluating their "prosecutorial vindictiveness" claim. In reliance on *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), they contend that the "appearance" of vindictiveness in this case is sufficient to warrant reversal of their convictions. They contend that this result is necessary "to assure all prospective defendants that there can and will be no chilling consequences" from the successful assertion of a procedural right (Pet. 9).

a. These claims rest on a fundamental misunderstanding of *Pearce* and *Perry*. While *Pearce* spoke of a defendant's right to be "freed of apprehension of * * * a retaliatory motivation" (395 U.S. at 725), the Court explained that increased penalties following a successful appeal would be proper if non-vindictive "reasons * * * affirmatively appear." 395 U.S. at 726. *Perry* later confirmed that the Due Process Clause can be invoked only when there is a "realistic likelihood" of vindictiveness. 417 U.S. at 27. Thus, there is no constitutional violation when the risk of actual vindictiveness is "de minimis." *Chaffin* v. *Stynchombe*, 412 U.S. 17, 26 (1973). The Court has also explained that the "due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right * * * but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978).

In the present case, there was not only no realistic likelihood of prosecutorial vindictiveness—there was none in fact as the district court specifically found following a factual hearing in which the government bore the burden of proof. As the court of appeals explained (Pet. App. 21a-22a):

> The district court, on evidence which we have carefully examined and find amply sufficient, concluded that the government had carried its burden to demonstrate an absence of actual vindictiveness here. The conversion counts were added out of a proper concern by the prosecutor to have a second bowstring should the false statement counts be again dismissed. The tax charges grew naturally out of developments in the continuing grand jury proceedings in the cotton cases, developments which

> included the later recantation by a witness of earlier perjurious and misleading testimony which had appeared to absolve the defendants. By the time of the later indictment, the facts had unfolded to such a degree that a prosecutorial failure to go forward with the tax case would have been a dereliction of duty.

Under these circumstances, this Court's analysis in *Corbitt* v. *New Jersey*, 439 U.S. 212, 223 (1978), is fully applicable here: "We discern no element of retaliation or vindictiveness against [the defendant] * * *. There is no suggestion that he was subjected to unwarranted charges. Nor does this record indicate that he was being punished for exercising a constitutional right."

b. The record in this case also shows that there was no "realistic likelihood" of prosecutorial retaliation. In contrast to *Pearce* (which involved a more severe sentence following the defendant's appeal) and *Perry* (which involved enhanced charges following the defendant's insistence on a trial de novo), the second indictment in this case came after petitioners' dismissal motion. The case had not yet been tried, and the prosecutor had not invested resources in the litigation comparable to *Perry* and *Pearce*. In fact, it is in the interest of the prosecution to test the sufficiency of the indictment at an early point in the litigation. Nor did the prosecutor's actions suggest a vindictive purpose. It is normal for a prosecutor, following dismissal of an indictment for want of specificity, to redraft the charges to avoid the original deficiency.[2] Similarly, the tax indictment was conclusively

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[2]It is not reasonable to ascribe "vindictiveness" to the prosecutor's addition of the conversion counts to the second indictment. The original indictment contained 71 counts alleging false statements. The second indictment contained 44 counts alleging false statements and 48 conversion counts. As a practical matter, both indictments

free of vindictive taint since it was based on facts that were unknown to the prosecutor when the first indictment was obtained. In short, the facts that form the predicate for the district court's finding that there was no actual vindictiveness also demonstrate *a fortiori* that there was no realistic likelihood of vindictiveness.

c. The cases that petitioners rely on do not suggest that the second indictment in this case was improperly obtained.[3] In all of the cases (except *DeMarco*) enhanced charges were brought the second time (rather than cumulative charges bearing the same penalty, as in this case). Moreover, the subsequent indictment in the cases

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included such a substantial number of counts that no one could anticipate consecutive sentences on more than a handful of the counts.

[3]In *United States* v. *Groves*, 571 F. 2d 450, 452-453 (9th Cir. 1978), the court found "overwhelming circumstantial evidence that the indictment was returned and filed in retaliation" for the defendant's exercise of a procedural right. The court added that "[t]he conclusion is inescapable on this record that the government brought the marihuana charge in retaliation for the appellant's exercise of his statutory rights * * *." *Id.* at 454. In *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367, 1369-1370 (9th Cir. 1976), the court simply held that when a prima facie case of vindictiveness is made out, "the reason for the increase in the gravity of the charges must be made to appear." In *United States* v. *DeMarco*, 550 F. 2d 1224, 1226 (9th Cir. 1977), the Court found that "the government deliberately used the threat of a new indictment in California to deter the defendant from exercising his statutory * * * right." Similarly, in *United States* v. *Jamison*, 505 F. 2d 407, 413-417 (D.C. Cir. 1974), the Court found a due process violation where a prima facie case of retaliation was made out and the record was "devoid of any illumination" showing non-vindictive motives. The court recognized, however, that many grounds would justify an "escalation of an initial indictment" if they are not in fact vindictive. *Id.* at 417. Likewise, in *Lovett* v. *Butterworth*, 610 F. 2d 1002, 1004-1007 (1st Cir. 1979), the court of appeals recognized that it would be proper to obtain a second indictment enhancing the charges against the accused if the prosecutor's reasons were non-vindictive. See *id.* at 1006-1007 & n.10.

cited by petitioners were based either on the same facts that underlay the original charges (*Jamison* and *Lovett*) or on facts that were known to the prosecutor when the original charges were brought (*Groves, DeMarco*, and *Ruesga-Martinez*). In addition, the records in those cases showed either an absence of explanation for the new charges (*Ruesga-Martinez* and *Jamison*), or clear vindictiveness (*Groves*, *Lovett* and *DeMarco*). Thus, while it is true that the cited cases speak of the appearance of vindictiveness, each case rests on a factual record showing either actual vindictiveness or an unrebutted "realistic likelihood" of vindictiveness. There is no suggestion that these courts would reverse the convictions in this case, in which the government clearly established that there was no vindictiveness and the facts do not show a realistic likelihood of vindictiveness. See *United States* v. *Griffin*, 617 F. 2d 1342, 1346-1349 (9th Cir. 1980), holding that a claim of prosecutorial vindictiveness must be rejected when it is shown that the prosecutor's decision was "justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness."

2. Petitioners also argue that, by obtaining a tax indictment against petitioner Thomas, the government breached a plea agreement and their convictions must accordingly be reversed. However, no plea bargain took place in this case. And, in any event, the agreement that petitioners attempted to negotiate would not have precluded the tax indictment that was subsequently returned.

a. When a defendant enters a guilty plea based on a promise from the prosecutor, the promise must be fulfilled. *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). Thus, if the prosecutor breaches his promise the defendant is entitled either to withdraw his guilty plea and

plead anew or to receive specific performance. *Id.* at 263. Here, however, petitioners did not plead guilty in reliance on any promise from the prosecutor. To the contrary, they pleaded not guilty and went to trial. There are thus no guilty pleas to withdraw and—since petitioners exercised rather than waived their right to trial—there is no ground for claiming specific performance from the prosecutor in return for a waiver of rights. See *Government of Virgin Islands* v. *Scotland*, 614 F. 2d 360, 364-365 (3d Cir. 1980).[4]

b. Further, as the court of appeals correctly determined (Pet. App. 12a-13a), the plea agreement that petitioners were attempting to negotiate would not have precluded the tax indictment:

> Appellants' argument is viable only if we agree that the filing of the tax indictment was a breach of the proposed plea bargain. * * * Although we do not doubt that appellants would have liked for the plea agreement to dispose of all criminal matters then under investigation, we cannot conclude that such an expectation was reasonable viewing the evidence objectively. The tax fraud charges are totally unrelated to the cotton fraud charges, appellants were not even aware of the ongoing tax investigation, and no government attorney ever mentioned possible

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[4]Petitioners' reliance on *Cooper* v. *United States*, 594 F. 2d 12 (4th Cir. 1979), is entirely misplaced. In that case, the court held that expectations reasonably formed on the basis of a plea offer from the prosecutor may result in a continuing offer for a reasonable period of time. As noted below, petitioners had no reasonable expectation that the government would not obtain a tax indictment. Moreover, while the court in *Cooper* was critical of the government for withdrawing a plea offer, in the present case the negotiations were broken off by petitioners, not the government, when they learned of the tax indictment.

> tax charges in the negotiation process. While the question might be closer were the tax charges related to the cotton charges, it is inconceivable that Thomas could reasonably conclude that a plea bargain relating to cotton fraud charges would dispose of totally unrelated tax charges. Since we find that the tax matters were not within the scope of the proposed plea agreement, appellants' contention that the government breached the agreement by filing the tax indictment must fail.

United States v. *Minnesota Min. & Mfg. Co.*, 551 F. 2d 1106 (8th Cir. 1977), relied on by petitioners, is not inconsistent with the court of appeals' analysis. In that case, the court concluded that the return of an indictment following a guilty plea breached the agreement that prompted the guilty plea. The charges in the subsequent indictment were closely connected to the charges in the indictment to which the defendants pleaded guilty (*id.* at 1109), and the defendants were misled into believing that the plea bargain had disposed of all related violations (*id.* at 1109-1111).[5]

3. There is no merit to petitioner's final contention (Pet. 12-14) that Congress and the Secretary of Agriculture did not intend that criminal liability would attach in the circumstances of this case. Congress' intent is shown by the language of 15 U.S.C. 714m(a) and (c),

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[5]In addition, the defendants in *Minnesota Min. & Mfg. Co.* voluntarily disclosed the facts underlying both indictments on the understanding that, in so doing, they would mitigate their criminal liability. Here, in contrast, the defendants did not disclose the facts underlying the tax indictment; to the contrary, they made every effort to conceal those facts from the government—including suborning perjury before the grand jury (see Gov. Exh. 23 at 39-42; see also Pet. App. 21a-22a). Petitioners are thus in no position to argue that the return of the tax indictment violated any agreement with them.

which prescribes criminal penalties for persons who make false statements to and convert the property of the Commodity Credit Corporation. There is no logical reason for inferring that Congress meant to exclude fraudulent statements to obtain price support payments.[6] Nor is there any indication that the Secretary of Agriculture believed that criminal penalties were unavailable. Contrary to petitioners' argument (Pet. 13), the Secretary's statement that persons obtaining money through false representations must refund the sums involved is not an assertion that criminal penalties, prescribed by Congress to deter fraud, are inapplicable.[7] In sum, the court of appeals correctly concluded that (Pet. App. 8a-9a):

> [t]he statutory and regulatory scheme clearly provided for the imposition of criminal liability. * * * In the face of this statutory framework, we cannot accept appellants' argument that under the doctrine

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[6]Petitioners' arguments are not advanced by *Gutkneckt* v. *United States*, 396 U.S. 295 (1970), and *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978). *Gutknecht* set aside a conviction based on regulations that the Selective Service System had no statutory authority to promulgate. *Adamo Wrecking* held that a particular work practice standard was not an "emission standard," and hence violations of the standard would not give rise to criminal penalties under a statute prescribing penalties for violations of emission standards. There can be no claim in this case that the forms that petitioners caused to be submitted to the Commodity Credit Corporation were not "false statements" under 15 U.S.C. 714m(a), or that the payments that they wrongfully obtained did not constitute a conversion of the property of the agency under 15 U.S.C. 714m(c).

[7]As the court of appeals correctly pointed out (Pet. App. 8a n.20), a subsequent clarification of the Secretary's regulation stated the obvious—that refund liability was supplemental to other civil and criminal liabilities. Indeed, one of the forms that was the basis for the false statements charges against petitioners specifically warned of criminal liability (Pet. App. 8a n.21).

of strict statutory construction the imposition of additional civil administrative sanctions by regulation must be read as the negation of statutory criminal liability for fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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